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# European Political Cooperation After the Single European Act: The Future of Foreign Affairs in the European Communities

by Daniel T. Murphy\*

## I. INTRODUCTION

The Single European Act (SEA)<sup>1</sup> consists of two ostensibly unrelated sets of provisions, both of which are intended to contribute to unification among members of the European Communities.<sup>2</sup> Perhaps the major, and most widely publicized, provisions of the SEA consist of amendments to the Treaty of Rome (EEC Treaty).<sup>3</sup> The remaining provisions of the SEA, predominately title III,

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<sup>1</sup> Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA]. The SEA entered into force July 1, 1987 after the last instrument of ratification, that of the Republic of Ireland, was deposited. 29 O.J. EUR. COMM. (No. L 169) 29 (1987). For a brief analysis of the SEA, see Glaesner, *The Single European Act: Attempt at Appraisal*, 10 FORD. INT'L. L.J. 446 (1987); Lonbay, *The Single European Act*, 11 B.C. INT'L COMP. L. REV. 31 (1988).

<sup>2</sup> There is no doubt that unification is one of the purposes of the SEA. In the preamble the member states note that in adopting the SEA they are:

[m]oved by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their States into a European Union, in accordance with the Solemn Declaration of Stuttgart of 19 June 1983 . . . .

SEA, *supra* note 1, at 2 (emphasis added).

The SEA has been criticized as a step backwards in the process of European unification. See Resolution, 29 O.J. EUR. COMM. (No. C 36) 144 (1986); Glaesner, *supra* note 1, at n.2; Pescatore, *Some Critical Remarks on the Single European Act*, 24 COMMON MKT. L. REV. 9 (1987).

<sup>3</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

The amendments to the EEC Treaty are the more widely publicized portion of the SEA. The most important of these amendments is the provision setting December 31, 1992 as the deadline for the completion of the internal market within the Community. In this market, all internal or national barriers to the four Community-established freedoms—the free movement of goods, persons, services, and capital—are eliminated. SEA, *supra* note 1, at title I, subsection II, arts. 13–15.

The SEA also alters the voting procedures of the Council of the European Communities (Council) for certain regulations and directives, especially those necessary for the realization of the internal market. See Glaesner, *supra* note 1, at 459–61. One effect of these reforms is to further weaken the impact of the Luxembourg Accords. The Luxembourg Accords were an understanding of the member states to agree that certain matters would not be put to a vote unless they enjoyed the unanimous support of the members. See *infra* note 92 and accompanying text. This agreement is affected by a provision allowing the adoption of certain additional regulations and directives by a qualified majority of the member states in the Council. SEA, *supra* note 1, at title II, art. 16 (amending articles 57(2), 59,

formalize the system of European Political Cooperation (EPC) within the member states.<sup>4</sup>

Although not widely written about, or perhaps appreciated in this country, EPC has become an efficient system for coordinating foreign affairs positions within the European Economic Community (EEC).<sup>5</sup> The EEC Treaty, as one of its aims, fosters a closer political union among its member states.<sup>6</sup> The framework of the EEC, however, does not fully provide the means for establishing a political union. EPC was designed as an extra-treaty mechanism to facilitate union in foreign affairs. Toward that end, the Community and its member states have informally evolved EPC procedures over the last fifteen years.<sup>7</sup>

In title III of the SEA, the member states have established a new system for cooperation in foreign affairs. Although title III is not the dominant portion of the SEA, the changes it makes in the EPC process are extremely significant. Title III and the process it creates represent a continuation of the uniquely

70(1), and 84 of the EEC Treaty). Previously, these measures could be adopted only by the unanimous vote of the Council. See generally D. LASOK & J. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 197-210 (4th ed. 1987).

The SEA also significantly enhances the role of the Parliament of the European Communities (Parliament) in the Community's legislative process. See SEA, *supra* note 1, at title II, art. 7 (amending article 149 of the EEC Treaty). Parliament now is afforded a role of cooperation in the adoption of measures by the Council. The new procedures provide for cooperation from the Parliament in the adoption of regulations and directives. Under these procedures, the Council will act by a qualified majority on a proposal for a regulation or directive submitted to it by the Commission of the European Communities (Commission) after receiving the opinion of the Parliament on the matter. Thereafter, the action of the Council, together with a full explanation of the reasons for its action, are communicated to the Parliament. If the measure, as approved by the Council, is adopted by Parliament, or Parliament takes no action on it, then it becomes effective. If Parliament rejects the measure, however, the regulation or directive can become effective only if it is reapproved by the unanimous vote of the Council. *Id.* See also D. LASOK & J. BRIDGE, *supra*, 197-210; Glaesner, *supra* note 1, at 464-68; Edward, *The Impact of the Single Act on the Institutions*, 24 COMMON MKT. L. REV. 19, 24-27 (1987); Bieber, Pantalis & Schoo, *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767 (1986).

In addition, the SEA adds several new substantive areas to the EEC Treaty. For example, as amended, the EEC Treaty now contains provisions dealing with the convergence of the member states' economic and monetary policies, improvement of the working environment, encouragement of cooperation in research and technology areas with the aim of strengthening the basis of European industry, and action by the Community on environmental matters. SEA, *supra* note 1, at title II, arts. 20, 21, 24, 25.

<sup>4</sup> SEA, *supra* note 1, at title III, art. 30.

<sup>5</sup> See generally D. LASOK & J. BRIDGE, *supra* note 3, at 210-15; P. MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* 253-55 (4th ed. 1985); Murphy, *The System of European Political Cooperation: A Brief Explanation*, 10 N.C.J. INT'L L. & COM. REG. 383 (1985); Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution* 60-78, in 1 *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, BOOK 3 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986) [hereinafter Stein]; Von der Gabletz, *Luxembourg Revisited or the Importance of European Political Cooperation*, 16 COMMON MKT. L. REV. 685 (1979).

<sup>6</sup> In the preamble to the EEC Treaty, the signatories state that they are "[d]etermined to establish the foundations of an even closer union among the European peoples." EEC Treaty, *supra* note 3, at 15.

<sup>7</sup> See *infra* notes 8-25 and accompanying text.

ambivalent *modus* by which the member states have reached agreements in foreign affairs in the past. Further, title III greatly enhances the status of EPC in contributing toward European unification since its structure and process are elevated to a series of treaty commitments. This change attests to the regard that member states hold EPC and presumably to the role they intend it to play in the future.

The purpose of this Article is to examine the pressures which led to the change in EPC and to consider how this system will function in the future. This Article begins with a discussion of EPC before the SEA and then reviews the origins of title III and the SEA. Next, the Article analyzes the process of EPC after the SEA. Finally, this Article considers the impact of the SEA on EPC in the future.

## II. EUROPEAN POLITICAL COOPERATION BEFORE THE SEA

The structure and process of EPC, as they previously existed, were a set of working relationships which evolved from declarations and communiqués issued following several meetings of member state leaders over the last two decades. The most important of these documents is the Luxembourg Report<sup>8</sup> issued in 1970 by the foreign ministers of the member states in response to the Hague Communiqué.<sup>9</sup> The Copenhagen Report,<sup>10</sup> issued in 1973, and the Paris Communiqué of the Heads of State and Government,<sup>11</sup> issued in 1974 at the conclusion of the Paris Summit, also discussed EPC. More recently, portions of the London Report<sup>12</sup> and the Solemn Declaration of Stuttgart<sup>13</sup> have dealt with EPC. The London Report reaffirms the earlier documents and refined EPC procedures. The Solemn Declaration emphasizes the importance of coordination in foreign policy as a means of facilitating European union.

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<sup>8</sup> *Report by the Foreign Ministers of the Member States on the Problems of Political Unification*, 3 BULL. EUR. COMM. (No. 11) 9 (1970) [hereinafter *Luxembourg Report*].

<sup>9</sup> *Final Communiqué of the Conference of Heads of State or Government on 1 and 2 December 1969 at The Hague*, reprinted in, COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1969, at 486 (1970). In this communiqué, the heads of state and government acknowledged that great progress had been made in the development of Community institutions and law. They instructed their foreign ministers to "study the best way of achieving progress in the matter of political unification within the context of [an enlarged Community]." *Id.* at 489.

<sup>10</sup> *Political Cooperation Between the Nine*, 6 BULL. EUR. COMM. (No. 9) 12 (1973) [hereinafter *Copenhagen Report*]; see also COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1973, at 502 (1974).

<sup>11</sup> *Meeting of the Heads of Government*, 7 BULL. EUR. COMM. (No. 12) 6 (1974) [hereinafter *Paris Communiqué*]; see also COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1974, at 297 (1975).

<sup>12</sup> *Report on European Political Cooperation*, 14 BULL. EUR. COMM. (Supp. 3) 14 (1981).

<sup>13</sup> *Solemn Declaration on European Union*, 16 BULL. EUR. COMM. (No. 6) 24 (1983) [hereinafter *Solemn Declaration*].

As suggested in these documents, EPC consists of periodic meetings by government leaders, or their representatives, from the member states with the aim of establishing common positions on issues of foreign policy.<sup>14</sup> A permanent committee, the Political Committee, and specialized working groups assist the government ministers in their work. In addition, civil servants of the member states' foreign ministries have ongoing discussions regarding both preparation for the meetings and implementation of decisions. This ongoing dialogue is perhaps as important as the ministerial meetings. The aim of these meetings and procedures is to enable the member states to coordinate their positions on foreign policy matters. These EPC procedures have resulted in institutional positions by the Community on matters of foreign affairs and have contributed to a sense of a common European policy.<sup>15</sup>

EPC is not an activity of the Community per se. There are no provisions regarding EPC in the EEC Treaty, and the specific responsibilities of the EEC's institutions, as stated in the constitutive documents, make no reference to it. Nevertheless, EPC has become a convenient means for the Community, as an entity, and for member states individually to address issues of common concern.<sup>16</sup> In turn, this mechanism and the positions taken have contributed to a sense of community among the members on non-economic matters.<sup>17</sup>

Central to the EPC process is the European Council. The constitutive EPC documents created this body;<sup>18</sup> it is the institutionalization of periodic meetings of the highest representatives of the governments of the member states. The European Council has become an extra-treaty entity through which the leaders of the member states oversee the workings of the Community institutions, in particular the process of decisionmaking within the Council of the European

<sup>14</sup> For a more detailed explanation of the workings of EPC, see Murphy, *supra* note 5, at 383-96; Stein, *supra* note 5, at 60-78; and Von der Gabletz, *supra* note 5, at 688-95.

<sup>15</sup> See *infra* note 16 and accompanying text.

<sup>16</sup> In 1987, for example, the member states reaffirmed their position that rapid withdrawal of Soviet forces from Afghanistan was an essential pre-condition for an end to that conflict. See 20 BULL. EUR. COMM. (No. 3) 80 (1987). The member states called for a political solution which guaranteed the Afghan people's right to self-determination. *Id.* The member states also endorsed the Central American peace plan put forth by President Arias of Costa Rica. See 20 BULL. EUR. COMM. (No. 6) 102 (1986); 20 BULL. EUR. COMM. (No. 11) 87 (1987). In 1986, the member states reaffirmed their condemnation of terrorism and agreed to intensify their common effort to combat it. See 19 BULL. EUR. COMM. (No. 1) 60 (1986). The member states also issued a common statement on human rights. See 19 BULL. EUR. COMM. (No. 7) 100 (1986). More recently, in 1989, the Community nations all agreed to simultaneously withdraw their envoys from Iran to protest death threats made by the Ayatollah Khomeini against Salman Rushdie, author of the novel *The Satanic Verses*. See *Europeans Recall Envoys from Iran over Rushdie Case*, N.Y. Times, Feb. 21, 1989, at 1, col. 6.

<sup>17</sup> Perhaps one reason for the integration that has taken place so far within the Community is that emphasis has been placed on economic rather than political issues. See D. LASOK, *THE LAW OF THE ECONOMY OF THE EUROPEAN COMMUNITIES* 385-477 (1980); D. LASOK & J. BRIDGE, *supra* note 3, at 5.

<sup>18</sup> *Paris Communiqué*, *supra* note 11. See generally Lauwaars, *The European Council*, 14 COMMON MKT. L. REV. 25 (1977).

Communities. The European Council is also responsible for providing the impetus behind the EPC process.<sup>19</sup>

The heads of state and government meet as the European Council four times a year.<sup>20</sup> Also, the foreign ministers of the member states, or their representatives, meet as the Council of the European Communities to consider EEC matters. These same ministers can continue their meeting and consider foreign affairs matters as the European Council. The President of the Council of the European Communities, a position which rotates between the member states every six months, is the spokesperson for the European Council in EPC matters.<sup>21</sup> In this capacity, the President is responsible for responding to questions in EPC matters put by the Parliament of the European Communities (Parliament) and for submitting annual statements to Parliament on EPC matters.<sup>22</sup>

The Commission of the European Communities (Commission) participates in EPC through its attendance at all ministerial EPC meetings, and it is represented at meetings of the Political Committee.<sup>23</sup> The Commission has no vote on EPC matters.<sup>24</sup> Although formally separate from the Community, EPC is an integral part of EEC activity. This is evident from the Commission's participation in the EPC process and from the fact that public announcement of EPC results are contained in official EEC documents.<sup>25</sup>

### III. ORIGINS OF TITLE III AND THE SEA

Although there is no consensus as to what political European union means, the notion of such a union is by no means new.<sup>26</sup> The SEA is only the most recent effort at facilitating a European union. During the past several years, there have been numerous proposals advancing the concept of a political Eu-

<sup>19</sup> See generally COMMITTEE OF THE THREE TO THE EUROPEAN COUNCIL, REPORT ON EUROPEAN INSTITUTIONS 15 (1979) [hereinafter THREE WISE MEN'S REPORT]; Duff, *The Report of the Three Wise Men*, 19 J. COMM. MKT. STUD. 237, 241-51 (1980-1981); D. LASOK & J. BRIDGE, *supra* note 3, at 210-14; P. MATHIJSEN, *supra* note 5, at 33-35; Lauwaars, *supra* note 18, at 25-31; Murphy, *supra* note 5, at 386-88; Stein, *supra* note 5, at 63; Von der Gablentz, *supra* note 5, at 386-88.

<sup>20</sup> *Copenhagen Report*, *supra* note 10, at 15.

<sup>21</sup> *Paris Communiqué*, *supra* note 11, at 7.

<sup>22</sup> *Luxembourg Report*, *supra* note 8, at 12; *Copenhagen Report*, *supra* note 10, at 17; *Paris Communiqué*, *supra* note 11, at 7.

<sup>23</sup> See generally Murphy, *supra* note 5, at 391; Stein, *supra* note 5, at 67-68.

<sup>24</sup> Stein, *supra* note 5, at 67.

<sup>25</sup> Every issue of the monthly Bulletin of the European Communities contains a section on EPC activities, and the annual General Report on the Activities of the European Communities summarizes the positions and statements of the member states on EPC matters.

<sup>26</sup> See HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FOURTEENTH REPORT ON EUROPEAN UNIFICATION H.L. 226 at x-xii (1985) [hereinafter HOUSE OF LORDS REPORT]; D. LASOK & J. BRIDGE, *supra* note 3, at 27.

ropean union.<sup>27</sup> In fact, at one point, the government leaders from the member states set European union as a goal to be achieved by the end of the 1970s.<sup>28</sup>

The Parliament, especially after the direct election of its members began in 1979, repeatedly expressed frustration about the slow development of the EEC into a political institution.<sup>29</sup> In 1981, two member states, Germany and Italy, presented a Draft European Act<sup>30</sup> which would have empowered the European Council to be the controlling political organ within a unified Europe. In response, the European Council issued the Solemn Declaration on European Union (Solemn Declaration).<sup>31</sup> This statement accepted the goal of political union, but imposed no obligation on the member states to work toward that goal. Moreover, the Solemn Declaration envisioned a union within the framework of the EEC Treaty.<sup>32</sup>

Two distinct approaches toward political unification were advocated. One approach was to achieve union through the Community; albeit through a Community with improved and more responsive decisionmaking institutions.<sup>33</sup> This approach suggested that the European Council assume a more active role in coordinating the workings of the EEC institutions and political cooperation. The European Council would be the paramount institution within the European union. The other approach despaired of political unification through the Community and advocated unification by agreements and institutions outside the EEC.<sup>34</sup>

The Solemn Declaration convinced Parliament of the futility of attempting to achieve political union through intergovernmental negotiations.<sup>35</sup> Parliament proceeded to draft its own unification proposal, the Draft Treaty Establishing

<sup>27</sup> *Tindemans Report*, 9 BULL. EUR. COMM. (Supp. 10) 1 (1976); THREE WISE MEN'S REPORT, *supra* note 19; Draft European Act, *reprinted in*, DIGEST OF THE INSTITUTIONAL DOCUMENTS OF THE COMMUNITY BETWEEN 1950 AND 1982, at 460 (1982) (published by the Committee on Institutional Affairs of the European Parliament) [hereinafter Draft European Act]; Draft Treaty Establishing the European Union, 27 O.J. EUR. COMM. (No. C 77) 33 (1984) [hereinafter Draft Treaty]; *see generally* Glaesner, *supra* note 1, at 446-48.

<sup>28</sup> *See Statement at the Conclusion of the Conference of Heads of State and Government of the Member States of the European Community, reprinted in*, COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1972, at 6 (1973).

<sup>29</sup> *See, e.g.*, 25 O.J. EUR. COMM. (No. C 66) 67-71 (1982); 25 O.J. EUR. COMM. (No. C 11) 191-93 (1982).

<sup>30</sup> *See* Draft European Act, *supra* note 27.

<sup>31</sup> *Solemn Declaration, supra* note 13.

<sup>32</sup> *See* DeZwaan, *The Single Europe Act: Conclusion of a Unique Document*, 23 COMMON MKT. L. REV. 747, 748 (1986).

<sup>33</sup> *See Tindemans Report, supra* note 27; THREE WISE MEN'S REPORT, *supra* note 19; *Solemn Declaration, supra* note 13.

<sup>34</sup> *See* Draft Treaty, *supra* note 27; Draft European Act, *supra* note 27.

<sup>35</sup> *See* F. CAPOTORTI, M. HILF, F. JACOBS & P. JACQUÉ, THE EUROPEAN UNION TREATY, COMMENTARY ON THE DRAFT ADOPTED BY THE EUROPEAN PARLIAMENT 10 (1986) [hereinafter F. CAPOTORTI].

the European Union (Draft Treaty).<sup>36</sup> This Draft Treaty, which Parliament adopted in 1984, did not amend the EEC Treaty nor did it contemplate European union within the framework of the EEC Treaty. Instead, the Draft Treaty supplants the EEC Treaty. The Draft Treaty took as its starting point the Community patrimony or *acquis communautaire*. This single, coherent document incorporates the institutions of the Community, modifies their roles and procedures, and adds certain extra-Community activities such as EPC.<sup>37</sup> Not surprisingly, the Draft Treaty would have dramatically increased the legislative power of Parliament at the expense of the European Council.<sup>38</sup>

The Draft Treaty proposed a federalist type of union among the EEC member states. It conferred a common citizenship on people of the signatory states and provided protection for certain fundamental human rights. For these reasons, the Draft Treaty would have impinged on the sovereignty of the member states to a greater extent than the EEC Treaty.<sup>39</sup>

This bold attempt at unification was clear evidence of Parliament's frustration at the pace which the member states were working toward the stated objective of European unification. Needless to say, the Draft Treaty was controversial.<sup>40</sup> Nevertheless, the national legislatures of six member states (there were ten at the time) endorsed the Draft Treaty.<sup>41</sup> Because of its rather extreme provisions and the adoption of the SEA, the Draft Treaty has not been, and probably will not be, ratified by the member states. It has had the salutary effect, however, of prompting further action by the member states.

Indeed, the Solemn Declaration preceded the Draft Treaty by about seven months. In the Solemn Declaration, the government leaders meeting as the European Council pledged to create a united Europe. They acknowledged that the "European idea" which had achieved economic integration through the EEC was the wish of the European people.<sup>42</sup> These statements by the European Council were made with the Draft Treaty and the Draft European Act in mind. They are certainly an endorsement of a political European union, but they demonstrate that the European Council contemplated union through the EEC.<sup>43</sup> The fact that the SEA was drafted and adopted within only two years of

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<sup>36</sup> Draft Treaty, *supra* note 27.

<sup>37</sup> See generally F. CAPOTORTI, *supra* note 35, at 15-20.

<sup>38</sup> *Id.* at 88-89; R. BIEBER, J. JACQUÉ & J. WEILER, AN EVER CLOSER UNION: A CRITICAL ANALYSIS OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION 37-40 (1985) [hereinafter EVER CLOSER UNION].

<sup>39</sup> See EVER CLOSER UNION, *supra* note 38, at 127-41.

<sup>40</sup> See, e.g., EVER CLOSER UNION, *supra* note 38, at 37-40; HOUSE OF LORDS REPORT, *supra* note 26.

<sup>41</sup> The national legislatures from Belgium, Denmark, France, Italy, Luxembourg, and West Germany endorsed the Draft Treaty. D. LASOK & J. BRIDGE, *supra* note 3, at 25.

<sup>42</sup> Solemn Declaration, *supra* note 13, at preamble.

<sup>43</sup> See DeZwaan, *supra* note 32, at 747.



Parliament's approval of the Draft Treaty is evidence that the member states viewed the Draft Treaty seriously.

The European Council's reaction to the Draft Treaty was the appointment of an Ad Hoc Committee for Institutional Affairs (Dooge Committee).<sup>44</sup> The report of this committee (Dooge Report) suggested improvements in cooperation, both within the EEC and in EPC.<sup>45</sup> The Dooge Report did not criticize the Draft Treaty. It acknowledged the stagnation that had crept into EEC decision-making and noted that Europe faced challenges from other nations and from relatively high levels of unemployment within the member states. As a means of meeting these challenges, the Dooge Report stated that the member states must "launch a new venture-establishment of a political entity . . ."<sup>46</sup> It recommended the convocation of a conference by the member states to negotiate a draft treaty on European union, based on the objectives and methods set out in the Report and the Solemn Declaration. In a somewhat surprising endorsement of the Draft Treaty, the Dooge Report urged that the negotiations should be "guided by the spirit and method of the Draft Treaty voted by the European Parliament."<sup>47</sup> Finally, the Report recommended several structural changes to the EPC process, most of which were carried over into title III of the Single Act.<sup>48</sup>

Events moved very quickly thereafter. The Dooge Committee's final report was submitted in March 1985, and the SEA was signed less than a year later in February 1986.<sup>49</sup> The Luxembourg government became President of the Council of the European Communities in July 1985 and proposed amending the EEC Treaty as a means of effecting the Dooge Report recommendations. The Council of the European Communities accepted the recommendations and agreed to call a conference of member state representatives to consider drafting amendments to the EEC Treaty. This conference opened in September 1985.

A working party comprised of representatives to the conference and from the Commission was assigned to draft revisions to the EEC Treaty. The Political Committee of the European Council was assigned to draft provisions regarding EPC. The resulting title III is, in part, a restatement of the EPC mechanisms that had been established by prior declarations of the European Council and

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<sup>44</sup> REPORT OF THE AD HOC COMMITTEE FOR INSTITUTIONAL AFFAIRS TO THE EUROPEAN COUNCIL, reprinted in, HOUSE OF LORDS REPORT, *supra* note 26, at app. 4 [hereinafter DOOGE REPORT]. See also Glaesner, *supra* note 1, at 448.

<sup>45</sup> DOOGE REPORT, *supra* note 44, at app. 4.

<sup>46</sup> *Id.* at lxviii.

<sup>47</sup> *Id.* at lxxvii.

<sup>48</sup> The Dooge Report also recommended that decisions of the Council of the European Communities be by qualified or simple majority and that Parliament be assigned an increased role in the decision-making process. Both of these reforms are contained to some extent in title II of the SEA.

<sup>49</sup> For an extensive discussion of the history of the drafting of the SEA, see DeZwaan, *supra* note 32.

had evolved over fifteen years of operation. The working party obtained agreement easily on these points. On other portions of title III, including some of its more important provisions, the working party was unable to achieve agreement.<sup>50</sup>

Perhaps it is no surprise, but Parliament's direct role in the drafting of the SEA was minimal. It delivered an opinion supporting the calling of the conference,<sup>51</sup> but it was not involved at all in the drafting of the text.<sup>52</sup>

#### IV. EUROPEAN POLITICAL COOPERATION AFTER THE SEA

The resulting document—the SEA—is simply a set of amendments to the EEC Treaty and a new set of EPC procedures, both of which contribute to European unification. It is not a unification document as is the Draft Treaty. Nevertheless, Parliament's objective of increasing its own power and integrating EPC into the institutional structure are included in the SEA, although not to the extent Parliament would have preferred.<sup>53</sup> While Parliament expressed reservations on many aspects of the SEA, it did not reject the document, as some had feared.<sup>54</sup>

It has been argued that the inclusion of title III within the SEA, a document which otherwise simply amends the EEC Treaty, was purely a political compromise.<sup>55</sup> It is true that great care was taken to keep title III separate from the rest of the SEA.<sup>56</sup> Title III, however, certainly is not unrelated to the rest of the SEA, and its objectives clearly fit into the overall purpose of the SEA.

Perhaps the first significant point about EPC, as restated in title III, is that the system is now embodied in an international agreement. Prior to the SEA, the articulation of EPC principles and processes was in declarations and communiqués issued after various European Council meetings. While these documents represented commitments of the member states, they were not legally binding agreements. After the enactment of the SEA, these EPC principles now have the force of international obligations and, as such, are enforceable as a

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<sup>50</sup> See DeZwaan, *supra* note 32, at 757.

<sup>51</sup> See Resolution, 28 O.J. EUR. COMM. (No. C 229) 29 (1985).

<sup>52</sup> See Bieber, Pantalís & Schoo, *supra* note 3, at 768.

<sup>53</sup> *Id.*

<sup>54</sup> Resolution, 29 O.J. EUR. COMM. (No. C 33) 119 (1986); see also DeZwaan, *supra* note 32, at 761. Parliament passed additional resolutions voting to take full advantage of the opportunities offered by the SEA even though its preferred version of European union was not achieved. Resolution, 29 O.J. EUR. COMM. (No. C 120) 96 (1986).

<sup>55</sup> Glaesner, *supra* note 1, at 453. The name "Single" European Act does not refer so much to the idea of a single, unified Europe as it does to one act containing two separate sets of provisions which for political purposes are contained in one document.

<sup>56</sup> See *infra* notes 93–98 and accompanying text.

matter of international law.<sup>57</sup> A separate issue, however, may remain: whether the common actions agreed upon by the European Council through EPC are themselves legally enforceable.<sup>58</sup> But clearly the EPC process, and the member states' obligation to participate in that process, is now a matter of international obligation.

The second significant point, and somewhat related to the first, is the status given to the European Council. Article 2 of title I of the SEA provides that the "European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European Communities."<sup>59</sup> By this provision, the existence of the European Council is likewise now established by treaty.

Third, the SEA greatly enhances the status and role of the Commission in EPC. The Luxembourg and Copenhagen Reports urged the involvement of the Commission in EPC matters, particularly when the issues affected the Community.<sup>60</sup> Title I, however, envisions the Commission as a full partner in EPC deliberations and decisionmaking.

This status of the Commission is carried over into title III. Article 30(3)(a) provides that the ministerial meetings constituting the EPC framework are meetings of the foreign ministers and a member of the Commission.<sup>61</sup> Inclusion of the Commission at the ministerial meetings assures full participation in EPC. This point is reinforced in the next section, article 30(3)(b), which states that the "Commission shall be fully associated with the proceedings of Political Cooperation."<sup>62</sup> The Commission is also charged with maintaining the consistency between policies agreed on in EPC and the external policies of the EEC. The President of the Council of the Communities, in his capacity as Presidency

<sup>57</sup> See Freestone & Davidson, *Community Competence and Part III of the Single European Act*, 23 COMM. MKT. L. REV. 793, 796 (1986). As to the legal status of title III within the legal system of the European Communities, see *infra* notes 99-102, 107-09 and accompanying text.

<sup>58</sup> In 1982, for example, the dispute between the United Kingdom and Argentina regarding the Falkland Islands was extensively considered within the Community and EPC. As an EPC matter, the member states agreed to prohibit the export of arms and military equipment to Argentina. See *Community Solidarity in the Falkland Islands Conflict*, 15 BULL. EUR. COMM. (No. 4) 7-8 (1982). The SEA does not speak to the issue of whether member states refusing to abide by a similar measure would now be in breach of an international obligation.

<sup>59</sup> SEA, *supra* note 1, at title I, art. 2.

<sup>60</sup> *Luxembourg Report*, *supra* note 8, at 12; *Copenhagen Report*, *supra* note 10, at 18. The President and members of the Commission were permitted to attend EPC meetings, and the Deputy Secretary General represented the Commission at meetings of the Political Committee. See Stein, *supra* note 5, at 67-68.

<sup>61</sup> SEA, *supra* note 1, at title III, art. 30(3)(a); Edward, *supra* note 3, at 29.

<sup>62</sup> SEA, *supra* note 1, at title III, art. 30(3)(b). Presumably, the Commission's full association carries with it a vote on EPC matters. Under the earlier EPC system, the Commission did not have this right. Stein, *supra* note 5, at 67.

of EPC, and the Commission are jointly charged with maintaining this consistency.<sup>63</sup>

Structurally, the SEA provides that EPC is to be conducted, for the most part, as it has in the past. Title I, article 3(2) provides that the provisions of title III confirm and supplement the procedures agreed to by the Luxembourg, Copenhagen, and London Reports; the Solemn Declaration; and the practices gradually established by the members. Article 3(2) states that the institutions and bodies responsible for EPC shall exercise their powers and jurisdiction under the terms of title III and the documents referred to in title I, article 1. These provisions incorporate the mentioned documents by reference and may elevate them to the status of international agreements.

Although the status of the European Council is elevated in title III, its role is left entirely unstated. Both the proposals for intra-Community and extra-Community unification called for significant involvement of the European Council as a supervisory and coordinating body.<sup>64</sup> Under the SEA, however, the European Council is assigned no role. It is merely to meet as such twice a year.<sup>65</sup> Even this is a reduction from the four meetings a year called for in the Paris Communiqué. This reduction reflects the concern that member states not view the European Council as simply another Community institution dealing with day-to-day business. Instead, the European Council should play a strategic role and give direction and political impetus to the Community.<sup>66</sup> The foreign ministers, or their representatives, however, are to meet at least four times a year, and they may meet to discuss foreign policy matters during meetings of the Council of the European Communities.<sup>67</sup>

The remaining structural provisions for EPC are contained in title III. The President of the Council of the European Communities shall also be the "Presidency of European Political Cooperation."<sup>68</sup> The role of the Presidency remains largely unchanged. The role of the Presidency is to initiate action, coordinate the EPC process, and represent the member states regarding EPC in relations with non-Community countries.<sup>69</sup> The Presidency is responsible for managing political cooperation and organizing the periodic meetings.<sup>70</sup> Title III creates a Political Committee comprised of the political directors from the foreign min-

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<sup>63</sup> SEA, *supra* note 1, at title III, art. 30(5).

<sup>64</sup> See *supra* note 33-38 and accompanying text.

<sup>65</sup> SEA, *supra* note 1, at title I, art. 2.

<sup>66</sup> DOOGÉ REPORT, *supra* note 44, at lxxv; Ever Closer Union, *supra* note 38, at 337; *Solemn Declaration*, *supra* note 13, at 25-26; see also D. LASOK & J. BRIDGE, *supra* note 3, at 213.

<sup>67</sup> SEA, *supra* note 1, at title I, art. 3(a).

<sup>68</sup> *Id.* at title III, art. 30(10)(a).

<sup>69</sup> *Id.* at title III, art. 30(10)(b). The Presidency is also the spokesperson for EPC generally.

<sup>70</sup> *Id.*

istries of the member states and requires that the Committee meet regularly.<sup>71</sup> The Political Committee's function remains essentially unchanged: to prepare for the ministerial meetings and to maintain ongoing business of EPC.<sup>72</sup> Further, title III creates a group of European Correspondents, under the direction of the Political Committee, to monitor the implementation of EPC policies.<sup>73</sup> Title III also authorizes working groups to work under the direction of the Political Committee and on tasks specifically assigned to it.<sup>74</sup>

A significant structural change is the creation of a permanent secretariat based in Brussels to assist the Presidency in EPC activities.<sup>75</sup> The lack of permanent staff for EPC had long been a source of concern.<sup>76</sup> Previously, the system of EPC relied primarily on the foreign office of the member state serving as President of the Council of the European Communities. This was a hardship especially for the smaller countries.<sup>77</sup>

Although title II of the SEA significantly enhances the role of Parliament in the EEC's legislative process, its involvement in EPC has not been increased. In title III, the signatories commit to ensuring that Parliament be "closely associated with . . . [EPC]."<sup>78</sup> This provision strengthens Parliament's role in the EPC process to the extent that title III is legally binding.<sup>79</sup> The specifics of the consultation procedures in title III, however, may result in an actual diminution of Parliament's role.

Article 30(4) of title III requires the Presidency to regularly inform Parliament of the foreign policy issues examined in EPC and to insure that its views are taken into consideration. Title III, however, does not specify the means by which such consultation is to take place. Under the previous procedures, the Luxembourg and Copenhagen Reports specifically called for periodic meetings between the foreign ministers and the Political Committee of Parliament. At the meetings, the parties discussed policy matters and received Parliament's proposals as a means of involving Parliament in the process.<sup>80</sup> The Copenhagen Report also required the Presidency to submit a report annually to Parliament

<sup>71</sup> The Luxembourg and Copenhagen Reports required meetings at least quarterly. In fact, the Committee members meet much more frequently, at least monthly. See Stein, *supra* note 5, at 64.

<sup>72</sup> SEA, *supra* note 1, at title III, art. 30(10)(c).

<sup>73</sup> *Id.* at title III, art. 30(10)(e).

<sup>74</sup> *Id.* at title III, art. 30(10)(f).

<sup>75</sup> *Id.* at title III, art. 30(10)(g).

<sup>76</sup> See, e.g., *A Report on European Political Cooperation and the Role of the European Parliament, 1981-1982* EUR. PARL. DOC. (No. 1-335) 48-52 (1981) [hereinafter *Report on European Political Cooperation*].

<sup>77</sup> See Murphy, *supra* note 5, at 390.

<sup>78</sup> SEA, *supra* note 1, at title III, art. 30(4).

<sup>79</sup> See Bieber, Pantalis & Schoo, *supra* note 3, at 786-87. How Parliament can enforce this right, however, is unclear. See *infra* notes 106-09 and accompanying text.

<sup>80</sup> The Luxembourg Report called for these meetings two times a year. *Luxembourg Report, supra* note 8, at 12. The Copenhagen Reports increased the number to four a year. *Copenhagen Report, supra* note 10, at 17. See Lauwaars, *supra* note 18, at 30.

on political cooperation.<sup>81</sup> Parliament debated this annual report and the Presidency was to reply to the debate.<sup>82</sup> In addition, the Presidency was to submit to questioning by Parliament on EPC.<sup>83</sup>

Article 1 of title I provides that political cooperation shall be governed by title III. The provisions of title III are said to "confirm and supplement the procedures agreed to in the reports of Luxembourg, . . . Copenhagen, . . . London, . . . and the Solemn Declaration."<sup>84</sup> Using this incorporation technique, the periodic meetings and the annual report of the Presidency called for in the Luxembourg and Copenhagen Reports can ensure that the views of the Parliament be taken into consideration, as title III requires. Parliament's questioning of the Presidency can also serve a useful oversight role.<sup>85</sup> It is unclear, however, whether this procedure is required any longer. It is not expressly provided for in title III. Curiously, the Paris Communiqué, which did call for it, is not one of the documents referred to in title I as being the basis of EPC.

#### V. THE IMPACT OF THE SEA ON EUROPEAN POLITICAL COOPERATION

The working procedures of title III continue the EPC mechanism whereby a common foreign policy can be pursued. The provisions of title III, however, do more than restate past EPC procedures.

##### A. *Commitment to a Common European Foreign Policy*

The first subsection of article 30 contains a broad commitment by the signatories to use the EPC procedures for foreign affairs issues. It states that the parties "being members of the European Community, *shall endeavor* to jointly formulate and implement a European foreign policy."<sup>86</sup> One might dismiss this provision as noncommittal—as being merely an agreement to attempt a joint European foreign policy. The sections of article 30 which follow demonstrate that this is not just hortatory rhetoric. Through these sections, the signatories more specifically obligate themselves to arrive at common policies.

There is, moreover, an interesting implication of the broad, somewhat ephemeral commitment in article 30(1). It is a more affirmative commitment to a common foreign policy than was expressed previously in the EPC documents listed in article 1, and it shows an evolution in the EPC process. The Luxembourg and Copenhagen Reports seem to be premised on the notion of consistent

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<sup>81</sup> *Copenhagen Report*, *supra* note 10, at 17.

<sup>82</sup> *Report on European Political Cooperation*, *supra* note 76, at 43.

<sup>83</sup> *Paris Communiqué*, *supra* note 11, at 7.

<sup>84</sup> SEA, *supra* note 1, at title I, art. 1.

<sup>85</sup> See Murphy, *supra* note 5, at 393–94; Stein, *supra* note 5, at 68–69.

<sup>86</sup> SEA, *supra* note 1, title III, art. 30(1).

national foreign policy positions which fostered a political union.<sup>87</sup> Article 30(1) takes this point further; it commits the signatories to attempt a common European foreign policy.

Articles 30(2)(a) and (b) of title III require consultation and coordination on the same basis as the Luxembourg and Copenhagen Reports. The signatories agree in these sections to inform and consult with each other on foreign policy matters of general interest before deciding on final positions. Articles 30(2)(c) and (d), however, take these consultation procedures further. Before adopting final positions, the signatories must take into account the position of the other signatories and the desirability of adopting a common policy.<sup>88</sup> The signatories, moreover, must agree to avoid taking positions which weaken the efficacy of the European unit—the Community—in international affairs or within international organizations.<sup>89</sup> Hence, the signatories agree positively to attempt a common policy and agree negatively to avoid any unilateral policies which might diminish the standing of the Community. The signatories carry over these same commitments to their activities as members of international organizations or participants in international conferences. In each they agree to take common positions on issues germane to EPC.<sup>90</sup>

While these provisions do not require the signatories to reach common positions, they do require some affirmative action to attempt common actions. The obligation to attempt common action is implicit in the language "shall endeavor," which is repeated throughout the SEA. Also, article 30(3)(c) requires the signatories to take specific actions to reach the goal of common action. Article 30(3)(c) goes further than the prior EPC documents by providing that, in order to "ensure swift adoption of common positions and the implementation of joint action, the High Contracting Parties *shall, as far as possible, refrain from impeding the formulation of a consensus* and the joint actions this could produce."<sup>91</sup>

This obligation is designed as a fairly strong-armed technique for consensus building. It requires the signatories to yield their different national positions in favor of consensus, "as far as possible." One might quickly focus on the qualifying phrase "as far as possible" and conclude that this provision really adds nothing and imposes no additional obligation on the signatories. If the member

<sup>87</sup> The Luxembourg Report urges a coordination of positions, and common action when possible and desirable. *Luxembourg Report*, *supra* note 8, at 11. The Copenhagen Report requires the signatories to consult on foreign policy matters and not to take final positions until such consultation. *Copenhagen Report*, *supra* note 10, at 17–18. In the Paris Communiqué, the Heads of State and Government committed themselves to gradually adopting common positions and to coordinate their diplomatic activities in matters affecting the interests of the European Communities. *Paris Communiqué*, *supra* note 11, at 7.

<sup>88</sup> SEA, *supra* note 1, at title III, art. 30(2)(c).

<sup>89</sup> *Id.* at title III, art. 30(2)(d).

<sup>90</sup> *Id.* at title III, arts. 30(7)(a), (7)(b).

<sup>91</sup> *Id.* at title III, art. 30(3)(c).

states are of the same mind, then there is consensus; if not, presumably it is for some serious internal reason, and hence consensus is neither possible nor required. This reading, however, seems to be too perfunctory.

Article 30(3)(c) presumes consensus and common action. Any member state failing to accede to the majority bears the burden of demonstrating, if challenged, that its failure to yield is not possible. Hence, the "as far as possible" exception seems to be precisely that, a narrow exception from consensus for circumstances out of the ordinary. The formulation of this obligation in article 30(3)(c) implies that blocking consensus is not presumed to be the usual state of behavior. In article 30(3)(c), the signatories appear to add substance, rather than mere rhetoric, to the goal of a common European foreign policy.<sup>92</sup>

### B. *Separation of EPC and the Community*

The SEA carefully separated the Community, on the one hand, and EPC, on the other. This separation is clear in at least three respects within the SEA. It

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<sup>92</sup> It is interesting to consider article 30(3)(c) in relation to the amendments to the EEC Treaty in title II which allow for voting by qualified majority. *Id.* at title II, arts. 6, 7. This reform was intended to dilute the effect of consensus voting under the so-called Luxembourg Accords and to eliminate the stagnation in Community affairs which resulted from it. See HOUSE OF LORDS REPORT, *supra* note 26, at xvii-xx; D. LASOK & J. BRIDGE, *supra* note 3, at 205-10; P. MATHIJSEN, *supra* note 5, at 30-32. In contrast, article 30(c)(30) encourages consensus building.

From the outset, the EEC Treaty has provided for qualified majority voting by the Council on most measures. In the mid-1960's, a crisis occurred which had the effect of paralyzing the Council as a decision making body. Relations between France and the other five member states became strained. In 1965, during the Council Presidency of France, certain measures vital to the Community were not adopted because of France's opposition and its control of the timetable for adoption. For seven months thereafter France refused to participate in Council activities. This stalemate was broken at an informal Council meeting in Luxembourg. The understanding reached there was that when voting by qualified majority was allowed and the matter affected very important interests of the members, the Council would endeavor to reach a unanimously acceptable solution. France maintained that discussion on the topic must continue until unanimity was reached. See *Luxembourg Accords printed in COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES* 31-33 (1966); HOUSE OF LORDS REPORT, *supra* note 26, at xix; D. LASOK & J. BRIDGE, *supra* note 3, at 205-06. This understanding did not constitute an amendment to the EEC Treaty and is thought to be legally invalid. See D. LASOK & J. BRIDGE, *supra* note 3, at 207. As a consequence of these Accords, the Council did not resolve many important matters.

In 1974, the Heads of State and Government announced that it is necessary to renounce the practice of requiring unanimity for all decisions. See COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1974, at 298 (1975). The reformed voting provisions in title II reinforce the notion that qualified majority, not unanimous, voting is encouraged. These provisions of title II amend the voting procedures to reduce from unanimity to qualified majority the votes necessary for approval of certain measures. See D. LASOK & J. BRIDGE, *supra* note 3, at 209.

On the other hand, the aim of article 30(c)(3) is to force consensus. If consensus is achieved, common action can be taken. The paralysis of the Council resulting from the Luxembourg Accords was the result of a lack of consensus.



is also clear that the separation is more formal than real and that functionally there is little separation.

First, article 3 of title I sets out separate bases for the authority and jurisdiction of the Community institutions and for EPC. Article 3(1) states that the EEC institutions exercise their powers and jurisdiction under the EEC Treaty as amended by title II of the SEA. Article 3(2) states that the institutions and bodies responsible for EPC exercise their power and jurisdiction according to title III and the documents referred to in article 1.<sup>95</sup> Thus, article 3(1) purports to confine the conduct and activities of Community institutions to those set forth in the EEC Treaty while article 3(2) lists the documents governing EPC. Article 3(1) does not, however, remove EPC from the Community.

Second, the signatories in titles I, II, and IV are referred to as member states. This is consistent with the notion that these titles amend the EEC Treaty. In contrast, throughout title III the signatories are referred to as "High Contracting Parties."<sup>94</sup> This distinction highlights the separation of EPC from the Community order.

Article 3(2) and article 30, however, do not divorce EPC from the Community. Within title III, the signatories, as independent contracting parties, acknowledge their relationship to the Community. Article 30(1) refers to the "High Contracting Parties, being members of the European Community . . . ."<sup>95</sup> The reference to High Contracting Parties is typical in treaties and reinforces the concept that the agreements regarding EPC in title III constitute international commitments. It may also be construed as a statement that these commitments are separate from the Community order.<sup>96</sup> Within article 30(1), however, the signatories acknowledge their relationship to the Community. They refer to themselves as "members of the European Community."<sup>97</sup> More importantly, the signatories make the commitments of title III as such.<sup>98</sup>

<sup>95</sup> SEA, *supra* note 1, at title I, art. 3(2).

<sup>94</sup> See *id.* at title III, art. 30. One exception is in Article 30(10)(b) in which the Presidency is charged with the responsibility of initiating action and "coordinating and representing the positions of the Member States in relations with third countries." *Id.* at title III, art. 30(10)(b) (emphasis added). Former European Court Judge Pierre Pescatore is critical, among other things, of the draftsmanship of the SEA. Judge Pescatore refers to it as "the worst piece of drafting I have come across in my practice of European Affairs . . . ." Pescatore, *supra* note 1, at 15. Judge Pescatore is especially critical of the drafting because it in large part amends the EEC Treaty which he regards as being very precisely drafted. *Id.*

<sup>95</sup> SEA, *supra* note 1, at title III, art. 30(1).

<sup>96</sup> The negotiations leading up to the SEA and the drafting of the several titles shows this separateness as well. The intergovernmental conference drafted titles I, II, and IV. The Political Committee of the European Council drafted title III. See DeZwaan, *supra* note 32, at 747-60.

<sup>97</sup> SEA, *supra* note 1, at title III, art. 30(1).

<sup>98</sup> *Id.* Article 30(1) reads in its entirety: "The High Contracting Parties, being members of the European Communities, shall endeavor jointly to formulate and implement a European foreign policy." *Id.*

Third, title IV, article 31 contains perhaps the most significant effort to separate EPC from the Community. This article states that the jurisdiction of the Court of Justice of the European Communities (European Court) shall apply only to title II, the title amending the EEC Treaty, and to article 32.<sup>99</sup> This provision purports to separate EPC and title III from the Community legal order.<sup>100</sup> Consequently, although title III sets forth a series of international obligations, these obligations and procedures are not incorporated into or enforceable within the Community legal order. Likewise, the European Council, which article 3 of title I establishes as a legal personality, is not incorporated into the Community legal order.

Title III, however, is replete with language creating obligations. Most of its provisions state that the High Contracting Parties "shall" do certain things.<sup>101</sup> If these obligations are not enforceable within the Community legal order, the signatories have recourse to other fora of international dispute resolution.<sup>102</sup>

### C. *Role of the Commission in EPC*

The purported bright line between the European Communities, on the one hand, and EPC, on the other, places the Commission in an ambiguous position. In turn, this ambiguity undercuts the separation of EPC from the Communities.

The Commission is purely a Community institution. In contrast, the European Council, although consisting of the same members as the Council of the European Community, is at least formally separate from the Community.<sup>103</sup> Under title I, article 2 and title III (neither of which are subject to the jurisdiction of the European Court) the Commission is assigned a significant role in EPC. The Commission is a full member of the European Council (article 2(1)) and participates in the EPC process (article 30(3)(b)). Also, the Commission is required along with the Presidency of EPC to assure that the external policies of the

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<sup>99</sup> *Id.* at title III, art. 32. Article 32 provides that, subject to article 3(1) (title II) and article 31, nothing in the SEA affects the treaties establishing the European Communities or other treaties modifying or supplementing them. *Id.*

<sup>100</sup> See Glaesner, *supra* note 1, at 451; Freestone & Davidson, *supra* note 57, at 796.

<sup>101</sup> For example, article 30(1) provides that the parties "shall endeavor jointly to formulate and implement a European foreign policy." SEA, *supra* note 1, at art. 30(1). Article 30(3)(c) states that the parties "shall, as far as possible, refrain from . . . impeding the formation of a consensus and joint action . . ." *Id.* at art. 30(3)(c). Article 30(8) provides that the parties "shall organize" a dialogue with third countries. *Id.* at art. 30(8).

<sup>102</sup> Freestone & Davidson, *supra* note 57, at 797. The authors suggest that title III might also be enforceable in the national courts of those signatories which accept treaties as directly part of their national legal systems, such as Germany. It is not clear how other signatories would have standing to raise title III issues in those national systems or what rights title III confers on citizens which could be raised in those courts.

<sup>103</sup> See Murphy, *supra* note 5, at 390.

Community and EPC are consistent.<sup>104</sup> By these provisions, the signatories have expanded the role and authority of the Commission, and they have assigned the Commission certain additional responsibilities within the EPC process. This institution, which before had been purely a creature of the EEC Treaty, is now assigned extra-Community activities.<sup>105</sup> By virtue of article 31, however, the Commission's EPC activities apparently are not reviewable by the European Court.

What, if any, review of the Commission's role in EPC exists is unclear. Although, by reason of article 31, title III is not incorporated into Community law, it does contain a series of international obligations. The Commission, however, is neither an international person,<sup>106</sup> nor is it a signatory of the SEA. Consequently, it is difficult to see how the obligations of title III can be enforced against a recalcitrant Commission.<sup>107</sup>

The corollary legal issues regarding the Commission's involvement in EPC are similarly difficult. Title I and title III require action on the part of the Commission. Assume a member state or other Community institution believes a particular action by the Commission, or participation of the Commission as a general matter, is outside its authority. The basis for judicial review of such conduct is difficult to articulate. The SEA appears to give the Commission an extra-treaty role. The rules of the EEC Treaty are not applicable to review the Commission's discharge of these responsibilities.

Certainly, if in performing its obligations under title III, the Commission were to violate some provision of the EEC Treaty or other Community law, the European Court could review the Commission's action and find it prohibited by Treaty authority.<sup>108</sup> There is no provision in the EEC Treaty, however, stating that the Commission is limited to the authority granted to it by the EEC Treaty.<sup>109</sup> Consequently, it may be possible for the Commission to perform its

<sup>104</sup> SEA, *supra* note 1, art. 30(5). Article 30(5) obligates the Presidency of EPC and the Commission to assure consistency between the external policies of the Community and EPC. It requires each to discharge this obligation "within its own sphere of competence." *Id.* Article 30(3)(b), however, which inserts the Commission into the EPC process, is not so limited.

<sup>105</sup> See *supra* notes 59-63, 105 and accompanying text.

<sup>106</sup> While the Community itself enjoys a type of international personality, its institutions do not. *Algera v. Common Assembly*, 1956-57 E. Comm. Ct. J. Rep. 39; D. LASOK & J. BRIDGE, *supra* note 3, at 34.

<sup>107</sup> Under article 30(4), the Presidency is also required to inform regularly the Parliament of the issues being examined within the EPC and to insure that Parliament's views are taken into consideration. But it is unclear how the European Parliament, which similarly is not an international person or signatory, can enforce its right to participate in the EPC process.

<sup>108</sup> See generally T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW*, 335-37 (2d. ed. 1988).

<sup>109</sup> Article 4(1) of the EEC Treaty lists the institutions of the Community, including the Commission, and states that "[e]ach institution shall act within the powers conferred upon it by this Treaty." EEC Treaty, *supra* note 3, at art. 4(1).

This provision can be read in several ways. By one reading, it means that each institution when discharging Community or Treaty activities shall act according to the EEC Treaty. This reading does

title III role in a manner which is consistent with, or at least not in violation of, its Community authority. Given the uncertainty of judicial review, the private and perhaps public persuasion of the Council of the European Communities, the European Council, or Parliament may be required either to force participation or to review excessive participation.

The question of the Community's foreign relations power is a very sensitive one. In *Commission v. Council (ERTA Case)*,<sup>110</sup> the European Court took the position that the Community has the power to enter into international agreements and otherwise to engage in foreign relations over issues covered by part I of the EEC Treaty. The member states have been concerned that this decision allows the Community to aggregate power to itself at their expense.<sup>111</sup> One reason for not incorporating title III into the Community legal order is that same fear. To do so would give the Community-biased European Court the opportunity to further extend the authority of the Community in foreign affairs.<sup>112</sup> The lack of Community review of the Commission's activity within title III, however, appears to allow for precisely that activism.

At one perhaps crucial point, title III does confine the Commission's role in EPC. Article 30(5) charges the Presidency and the Commission, "each within its own sphere of competence,"<sup>113</sup> with maintaining consistency between the external policies of EPC and the Community. To the extent that the Commission discharges this function, the Commission's authority seems to be limited by its authority granted under the EEC Treaty. To avoid the uncertainties surrounding judicial review of the Commission's role in EPC, there might be a tendency to consider all of the Commission's EPC activities as subsumed under this section. The Commission's general participation in the EPC process, however, is not limited by the language "within its competency." Further, the SEA appears

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not negate the possibility of extra-Treaty responsibilities being assigned to a Community institution. The provision can also be read to mean that every activity of the institution must be discharged according to the EEC Treaty.

The signatories of the SEA certainly were not guided by this latter reading. They assigned the Commission responsibilities and activities not mentioned in the EEC Treaty, and then they explicitly stated in article 31 of the SEA that these activities are outside the Community legal order. The latter reading of article 4(1) would preclude any Commission participation in the EPC process, since EPC is specifically outside the EEC Treaty. This is clearly not what the signatories intended.

The Court of Justice of the European Community (European Court) has interpreted the powers of Community institutions rather inclusively when discharging Community-related activities. The European Court has not limited the authority of the institutions to that which is explicitly stated in the EEC Treaty. *See, e.g.,* Casagrande v. Landes-hauptstadt Munchen, 1974 E. Comm. Ct. J. Rep. 773, 14 Comm. Mkt. L.R. 423 (1974); *Commission v. Council (ERTA Case)*, 1971 E. Comm. Ct. J. Rep. 263, 10 Comm. Mkt. L.R. 335 (1971) [hereinafter *ERTA Case*]. There are no Court cases as yet reviewing the Commission's authority to engage in activities outside the Community order.

<sup>110</sup> 1971 E. Comm. Ct. J. Rep. 263, 10 Comm. Mkt. L.R. 335 (1971).

<sup>111</sup> *See* Freestone & Davidson, *supra* note 57, at 799.

<sup>112</sup> *Id.*

<sup>113</sup> SEA, *supra* note 1, at title III, art. 30(5).

to assign the Commission a much broader role than simply maintaining consistency of external positions.

#### D. *Functional Realities of the New EPC*

The role assigned to the Commission by title III, as well as the continuation of past EPC practices, assures not only more interchange within the Community's institutions on EPC matters, but also significant involvement by the Community directly in the EPC decisions. Given this reality, it is difficult to maintain that the Community and the EPC process are separate. The signatories have acknowledged their desire for a political European union, and the Community and EPC both have as an object "to contribute together to making concrete progress towards European unity . . . ."<sup>114</sup> Why then have the signatories gone to the extreme lengths referred to assure, at least on paper, that the two are separate? Why not subsume EPC within the Community as has been previously suggested?<sup>115</sup>

The formal separation of the Community and EPC provides the member states with several advantages. As a practical matter, the Community is deeply involved in EPC. Yet the formal separation of the two gives the member states the opportunity to deny the degree of unity which exists. A European foreign policy directed by the Community would diminish the status and autonomy of the member states. There may be a fear that the Community would become too effective. To increase the sphere of Community competence and include foreign affairs unrelated to the other Community activities could force a political European union, or a more complete union, before the signatories are ready.<sup>116</sup>

A second advantage of the formal separation is that EPC, including the Commission's involvement, is outside the European Court and the qualified voting provisions of the EEC Treaty. This may make it easier for the member states to handle contentious issues, especially if it is unclear whether they directly relate to Community activities. If these difficult foreign policy issues are handled

<sup>114</sup> SEA, *supra* note 1, at title I, art. 1. See also *Solemn Declaration*, *supra* note 13, at 25-26.

<sup>115</sup> See, e.g., Draft Treaty, *supra* note 27.

<sup>116</sup> The unification consequences of many of the measures contemplated in the SEA are already causing alarm within the Community. For example, the United Kingdom has expressed concern over the notion of a single European currency and central bank. See *Single European Currency 'Long Way Off'*, The Times (London), July 1, 1988, at 12, col. 4; *EEC Rules Give Britain the Right to Veto Plan for European Central Bank*, The Times (London), July 2, 1988, at 7, col. 5, 10 col. 1. The United Kingdom has also reacted to a statement by the President of the Commission, M. Jacques Delors, that national parliaments will have to give way to the embryo of a European government within seven years and to the reality of the single European market after 1992. See *Parliament 'Doomed' by European Government*, The Times (London), July 7, 1988, at 1, col. 2; *European Approaches*, The Times (London), July 11, 1988, at 15, col. 1 (editorial).

within EPC, there is little risk that the EPC action will later be judged to be beyond Community competence.<sup>117</sup>

#### VI. CONCLUSION

The EPC process as discussed in this article has only recently been implemented. It is too early to know whether the process will work more efficiently or differently than it did in the pre-SEA era. More importantly, perhaps, it is too early to know whether the process will really contribute to the political unification of Europe. The willingness of the member states to embody EPC in a treaty and assign the Commission such an integral role in EPC, however, attests to the potential the member states believe EPC possesses.

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<sup>117</sup> See Freestone & Davidson, *supra* note 57, at 800.